EVIDENTIARY ISSUES FREQUENTLY ARISING IN HOMICIDE CASES

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A. ADMISSIBILITY OF OUT-OF-COURT STATEMENTS OF OTHERS WHICH INCULPATE THE DEFENDANT UNDER THE SIXTH AMENDMENT CONFRONTATION CLAUSE AND THE DECLARATION AGAINST INTEREST HEARSAY EXCEPTION

1. Most recent USSC case: *Lilly v. Virginia* (1999) 527 U.S. 116.

Trial court admits out-of-court statement by defendant's accomplice (not a co-defendant) to police, stating defendant instigated carjacking and shot victim of carjacking, under declaration against penal interest exception to hearsay rule after accomplice takes the Fifth at trial. USSC judgment: Admission of statement violated defendant's Confrontation Clause rights. Plurality opinion of four: (a) accomplice confessions which inculpate a defendant are not within a firmly rooted hearsay exception for purposes of Confrontation Clause analysis; (b) rejects state court's determination that statements within "residual trustworthiness" test of Confrontation Clause because accomplice had been Mirandized, implicated himself in serious crimes, and portions of statements corroborated by other evidence. Scalia concurs in judgment, with little explanation as to why not joining plurality opinion. Four others: Accomplice's statements inculpating defendant simply not against accomplice's penal interest, plurality approach wrongly puts admissibility of "equally inculpatory" accomplice statements and accomplice statements to non-police in doubt.

2. Review of pre-*Lilly* USSC cases on application of Confrontation Clause to hearsay accomplice statements/confessions.

(a) ***Douglas v. Alabama*** **(1965) 380 U.S. 415**. Court unanimously rules that admission of a nontestifying accomplice's hearsay confession, which implicated the defendant as the shooter in an assault with intent to commit murder, was violative of Confrontation Clause due to lack of cross-examination. When declarant accuses another in circumstances in which declarant stands to gain, accusation is presumptively suspect.

(b) ***Bruton v. United States*** **(1968) 391 U.S. 123**. Co-defendant's confession saying he and defendant did crime

admitted at joint trial against co-defendant only, with jury told it could not be used against defendant. Holding: unrealistic to believe jury could follow such instruction, so defendant's Confrontation Clause rights were violated.

(c) ***Lee v. Illinois*** **(1986) 476 U.S. 530**. Co-defendant's statement implicating defendant violated Confrontation Clause. Court rejects claim that statement sufficiently reliable to justify admission, holding that presumption of unreliability applies, and was not rebutted. Consistency between co-defendant's and defendant's own confession ["interlock"] does not sufficiently establish reliability because confessions also had inconsistencies on issues in dispute at trial. Danger with such statements is "selective reliability." Dissent by four: statements were against penal interest, a firmly established hearsay objection, were extensively corroborated, relatively consistent.

(d) ***Cruz v. New York*** **(1987) 481 U.S. 186**. Co-defendant's confession implicating defendant not admissible despite "interlocking" and consistent confession by defendant. Still a Confrontation Clause violation, though defendant's confession may affect harmless error analysis. Four dissent.

(e) ***Richardson v. Marsh*** **(1987) 481 U.S. 200**. Co-defendant's confession redacted to omit any reference whatsoever to defendant, or any person who jury might identify as defendant. Jury told statement not admissible against defendant. Holding: redaction was sufficient to satisfy *Bruton* concerns, because redacted statement contained no reference to defendant's existence. Fact that defendant's own testimony created a "linkage" to defendant, by putting her in car during time in which co-defendant's statement said other perp said he would kill robbery victims, does not make *Bruton* applicable.

(f) ***Gray v. Maryland*** **(1998) 523 U.S. 185**. Case involving sufficiency of redaction of nontestifying co-defendant's statement. When co-defendant would mention defendant's name, the detective reading statement said "Deleted." Written version had blanks. Detective also said after getting co-defendant's statement, he arrested defendant. Bare majority notes that redactions which use blanks or other devices which notify jury that a name has been deleted are

not sufficient to satisfy Confrontation Clause.

3. California Cases.

(a) ***People v. Duarte* (2000) 24 Cal.4th 603**. California Supreme Court avoids Confrontation Clause issue by ruling nontestifying accomplice's confession not within Evidence Code section 1230 declaration against interest hearsay exception. Statement analyzed to see if declaration was both against declarant's penal interest and otherwise sufficiently reliable to warrant admission. Found that trial court had not redacted every exculpatory portion of statement. Notes particularly that in case in which both defendant and co-defendant were accused of shooting at house and hitting an occupant, co-defendant's claim he "shot high, at the roof" was exculpatory and blame-shifting. In assessing reliability, notes statement had blame-shifting aspects, and was made to police shortly after arrest, negative indicators of reliability. Thus, even if statement had been redacted to remove exculpatory material, still inadmissible due to overall lack of trustworthiness. Finds error prejudicial under *Watson* standard, referring to initial hung jury in which accomplice actually testified, jury inquiries about the accomplice's statement, and lack of physical evidence tying defendant to crime. Three justices say that if redaction properly done, statement should come in, because it was sufficiently trustworthy.

(b) ***People v. Fletcher* (1996) 13 Cal.4th 451**. Co-defendant Fletcher tells fellow prisoner that he and "friend" were using ruse to get cars to pull over so they could rob occupants, and that he shot a driver who stopped, then started driving away. Other evidence established that defendant Moord was with Fletcher moments after fatal shooting. Cal. Supreme Court anticipates USSC's 1998 holding in *Gray v. Maryland* that such redaction does not remove incriminating effect and did not avoid Confrontation Clause violation. *Fletcher* also holds that Prop. 8 abrogated the state law based decision of *People v. Aranda* (1965) 63 Cal.2d 518.

(c) ***People v. Gordon* (1990) 50 Cal.3d 1223**. Defendant's uncle, who lived in Georgia, told police that he had received a call from a person saying defendant had been shot and needed treatment. Uncle told them to come to Georgia, they did, and

uncle treated defendant's wounds. When uncle claimed Fifth, prosecutor introduced his extrajudicial statement to police. Admitted by trial court as statement against penal interest. Court reviews under abuse of discretion standard, upholds finding that statement, while not explicitly admitting knowledge of defendant's committing felony or intent to aid, impliedly did, thus subjecting declarant to risk of criminal liability as an accessory, even though police said he should not fear prosecution if he had taken no part in the crimes. Rejects argument that uncle in position to want to curry favor with prosecutor, distance himself from crimes, since no indication uncle was ever in California, where crimes were committed.

(d) ***People v. Greenberger*** **(1997) 58 Cal.App.4th 298**. Three co-defendants make statements to one acquaintance regarding their roles in a murder. Statements incriminate not only each declarant, but also co-defendants. Appellate court says statements were specifically disserving to declarants, within declaration against interest exception, that exception is firmly rooted for purpose of Confrontation Clause, and statements were trustworthy. Questionable analysis on all these points. Statement of declarant who drove car victim was kidnapped in that co-defendant had shot victim 13 times was found specifically disserving to declarant. Opinion does make point that statement to friend or acquaintance in noncoercive atmosphere is more trustworthy than statement produced by police interrogation.

(e) ***People v. Fuentes*** **(1998) 61 Cal.App.4th 956**. Appellate court affirms admission of statements by three accomplices to police, after accomplices take Fifth Amendment. Defendant was driver of car, three others get out of car, attempt to rob and then kill person. Accomplices' statements said that three who left car confronted victim with intent to rob, that one demanded money, two were armed, one did shooting. References to driver defendant had been redacted. Appellate court holds redacted statements were solely and specifically against interest of declarants, hence admissible under Evidence Code section 1230 hearsay exception. Although admits showing of trustworthiness is required for admission under Evidence Code section 1230 and for Confrontation Clause analysis, court does not discuss unreliability produced by police interrogation. Of doubtful validity after *Duarte*.

(f) ***People v. Bryden*** **(1998) 63 Cal.App.4th 159**. Accomplice sends jail "kite" to a second accomplice which is redacted to excise any statements directly implicating defendant, then admitted as a declaration against interest. Appellate court rules that jail kite between accomplices does not satisfy constitutional requirement of trustworthiness. Much of what was admitted was not directly against declarant's interest, and seemed to be motivated by decision to please and prove loyalty to other accomplice. However, error analyzed as only state evidentiary error, because the statement did not directly implicate defendant, and jury told it could not use against defendant. Rejects defendant's argument that kite enhanced credibility of second accomplice, who testified against defendant.

(g) ***People v. Wilson*** **(1993) 17 Cal.App.4th 271**. Defendant being prosecuted for shooting at two Hispanics after they accidentally hit his car while parking. Wife tells police defendant called her from jail, told her to take a gun he had used to "shoot the Mexicans" and hide it, which she did. Wife asserts marital privilege at trial. Trial court admits statements as declarations against penal interest. Appellate court rules statements were specifically disserving to wife, because they did subject her to criminal liability as an accessory. Notes there was no blame shifting, since uncontradicted that wife was not involved in actual shooting.

4. Summary of What to Argue in Favor of Exclusion

(a) Statement not within declaration against interest hearsay exception, due to lack of showing of unavailability, or because not every part of statement is specifically disserving to declarant, or because lack of general showing of trustworthiness.

(b) If not within hearsay exception, then also admission of statement violates Confrontation Clause, because not within firmly rooted hearsay exception.

(c) Even if within hearsay exception, admission of statement violates Confrontation Clause because hearsay statements of accomplice which incriminate others are not within a firmly rooted hearsay exception, or are presumptively suspect, not reliable.

(d) Redaction to eliminate specific references to defendant are inadequate because they tip jury off to fact that a name has been deleted.

B. EXCLUSION OF DEFENSE EVIDENCE: CONSTITUTIONAL AND STATUTORY ISSUES

1. Establishing That Exclusion of Evidence Violates a Defendant's Federal Constitutional Rights

(a) Nature of federal rights

Most recent United States Supreme Court pronouncements on federal constitutional rights implicated by exclusion of relevant defense evidence shows somewhat schizophrenic nature of caselaw. In *Montana v. Egelhoff* (1996) 518 U.S. 37, the plurality opinion of Justice Scalia surveys the constitutional scene and pronounces "Thus, the holding of *Chambers [v. Mississippi* (1973) 410 U.S. 284] -- if one can be discerned from such a fact-intensive case -- is certainly not that a defendant is denied `a fair opportunity to defend against the State's accusations' whenever `critical evidence' favorable to him is excluded, but rather that erroneous evidentiary rulings can, in combination, rise to the level of a due process violation." (518 U.S. at p. 53.) Scalia's plurality opinion reiterates "we were <u>not</u> setting forth an absolute entitlement to introduce crucial, relevant evidence," and stresses that entitlement yields to "`any valid state justification,'" citing *Crane v. Kentucky* (1986) 476 U.S. 683, 690-691. (*Ibid*.)

Dissenting opinion of Justice O'Connor stated that "the proposition that due process requires a fair opportunity to present a defense is not new." (*Id*., at p. 62.) Reads *Chambers v. Mississippi* as a constitutional "prohibition on enforcement of state evidentiary rules that lead, without sufficient justification, to the establishment of guilt by suppression of evidence supporting the defendant's case." (*Ibid.*)

In *Chambers*, the defendant had been prevented from cross-examining his own witness, who had made an out of court sworn confession to the murder for which Chambers was being prosecuted, which he recanted at trial, due to Mississippi's "voucher" rule. Evidence of the witness's confession of murder to three other witnesses was excluded on hearsay grounds. The U.S. Supreme Court found a due process violation and granted habeas. Court found that due process right to confrontation violated, since petitioner should have been able to cross examine his own witness, whose

testimony on direct recanting the sworn confession was adverse. Also, exclusion of evidence of confession to three others violates fundamental right to present witnesses in own defense. Testimony excluded "bore persuasive assurances of trustworthiness and thus was well within the basic rationale of the [hearsay] exception for declarations against interest. That testimony also was critical to Chambers' defense." (410 U.S. at p. 302.)

In *Crane v. Kentucky, supra*, 476 U.S. 683 the court reversed a conviction because of exclusion of evidence of the circumstances of his interrogation suggesting it was coerced, on grounds that voluntariness of the confession had been determined by judge. Court terms it "an evidentiary ruling that deprived petitioner of his fundamental constitutional right to a fair opportunity to present a defense." (*Id.*, at p. 687.)

Crane refers to the somewhat uncertain doctrinal bases of the "meaningful opportunity to present a complete defense," saying it exists, "whether rooted directly in the Due Process Clause of the Fourteenth Amendment, *Chambers v. Mississippi, supra*, or in the Compulsory Process or Confrontation clauses of the Sixth Amendment . . ." (*Id.*, at p. 690.) Right is defined (by unanimous court) as preventing exclusion of "competent reliable evidence . . . when such evidence is central to the defendant's claim of innocence. In the absence of any valid state justification, exclusion of this kind of exculpatory evidence deprives a defendant of the basic right to have the prosecution's case encounter and `survive the crucible of meaningful adversarial testing.' *United States v. Cronic*, 466 U.S. 648, 656 (1984)." (*Ibid.*)

In *Franklin v. Henry* (9th Cir. 1997) 122 F.3d 1270, the court considered whether exclusion of evidence that the alleged victim of a child molest had made false accusations of molestation against her mother was error of constitutional magnitude. Court states: "The explicit testimony bore on the credibility of the only percipient witness against Franklin. If believed by the jury, Franklin's testimony would have shown Shayna capable of fantasies about her mother analogous to the charge she made against Franklin. Exclusion of the evidence deprived Franklin `of the basic right to have the prosecutor's case encounter and 'survive the crucible of meaningful [adversarial] testing.' [Citation.]" (*Id.*, at p. 1273.)

(b) Applicable prejudice test for denial of due process right to present complete defense

Applicable test on direct appeal appears to be *Chapman v. California* (1967) 386 U.S. 14. (See *Crane v. Kentucky, supra*, 476 U.S. 683, stating that "the erroneous ruling of the trial court is subject to harmless error analysis . . . cf. *Delaware v. Van Arsdall* [(1986) 475 U.S. 673]." (*Id.*, at p. 691.) *Crane* remanded case to state court for determination of state's claim that the error was harmless because the same evidence excluded came in through other witnesses.

(c) Practice tips

(1) Clearly federalize your claim.

In *Duncan v. Henry* (1994) 513 U.S. 364 [130 L.Ed 2d 865], the U.S. Supreme Court vacated a grant of federal habeas because the petitioner had in his state appeal argued only that admission of evidence violated Evidence Code section 352 and caused a miscarriage of justice under the state law prejudice standard. "If a habeas petitioner wishes to claim that an evidentiary ruling at a state court trial denied him the due process of law guaranteed by the Fourteenth Amendment, he must say so, not only in federal court, but in state court."

(2) Federalize the claim on appeal even if no assertion of federal due process denial is made in trial court.

Unclear if such specification necessary, assuming general compliance with Evidence Code section 354. Since proper offer of proof would establish that evidence was relevant, admissible, and should not be excluded, there would be little gained in terms of policy of giving chance for trial court to avoid error, to require specification of federal due process grounds.

Additionally, if appellate court either ignores federal constitutional argument (as Sixth District did in *People v. Franklin, supra*, 25 Cal.App.4th 328), or if it denies claim solely on merits, any potential procedural default is cured as far as federal habeas review is concerned.

2. State Law Permitting Discretionary Exclusion of Relevant Defense Evidence: Evidence Code Section 352

(a) Statutory provision

Evidence Code section 352 provides:

"The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

(b) Application of provision by trial judge

"That balancing process requires consideration of the relationship between the evidence and the relevant inferences to be drawn from it, whether the evidence is relevant to the main or only a collateral issue, and the necessity of the evidence to the proponent's case as well as the reasons set forth in section 352 for exclusion." (*Kessler v. Gray* (1978) 77 Cal.App.3d 284, 291.)

Prejudicial evidence is evidence "that uniquely tends to evoke an emotional bias against a party as an individual, while having only slight probative value with regard to the issues." (*People v. Crittendon* (1994) 9 Cal.4th 83, 134.)

(c) Standard of appellate review

People v. Minifie (1996) 13 Cal.4th 1055, 1070: "Rulings under Evidence Code section 352 come within the trial court's discretion and will not be overturned absent an abuse of that discretion."

(d) Limits on trial court discretion

(1) Wholesale exclusion of evidence relevant to the prime theory of the defense.

In *People v. Wright* (1985) 39 Cal.3d 576, the court found an abuse of discretion when the trial court excluded evidence that homicide victim's urine was positive for morphine, indicating use within 24 hours of death. Defendant's defense was that he was confronted by victim who threatened him and accused

him of messing around with his wife, when defendant, though residing in the same trailer park, did not know victim or his wife. Court holds evidence of recent heroin use would corroborate defendant's claim of irrational behavior by victim, and impeach credibility of main prosecution witness, victim's wife, who said victim had not recently used. Court states, "Evidence that is relevant to the prime theory of the defense cannot be excluded in wholesale fashion merely because the trial would be simpler without it." (*Id.*, at p. 585.)

Court also states that "the purported prejudice to the prosecution cannot be based on mere speculation and conjecture." (*Ibid.*) However, court in *Wright* went on to uphold exclusion of evidence that victim was engaged in sale of heroin, possessed heroin for sale and was under the influence in an incident two years before his death in which he violently resisted arrest. Evidence of victim's violent resistance to arrest was admitted, all references to heroin excluded.

(2) Exclusion due to negative credibility determination by judge.

In *People v. Cudjo* (1993) 6 Cal.4th 585, defendant offered evidence of a jailhouse inmate that defendant's brother had confessed to the murder defendant was accused of, in situation where other evidence suggested defendant's brother was perpetrator. Trial court excluded evidence because it found informant testimony "unreliable and untrustworthy." Supreme Court ruled that evidence would not have consumed undue time, or confused issues, and that evidence had substantial probative value and was necessary since there was no comparable evidence of brother's guilt.

(3) Exclusion due to gross misbalancing of relevant factors.

In *People v. Minifie, supra*, 13 Cal.4th 1055, the court ruled that exclusion of evidence of prior threats to defendant by third parties associated with victim was

an abuse of discretion. In *Minifie*, defendant had killed a member of the Knight family. He was threatened and attacked in jail, and threats from friends of the Knight family were made to his wife. The victim, a pallbearer for the man defendant had killed, approached defendant, asked if defendant knew who he was, said, "So it was you," and punched defendant, knocking him to the floor. Defendant pulled his gun and fired, striking pallbearer and bystander. After holding that threats from third parties who are associated with victim are relevant to issue of whether defendant reasonably believed that serious bodily injury was about to be inflicted on him, Supreme Court held that judge's exclusion of the evidence was abuse of section 352 discretion.

In *People v. McAlpin* (1991) 53 Cal.3d 1289, the court held that it was an abuse of discretion in a child molestation prosecution to exclude evidence by defendant's friends that they had observed defendant's behavior toward their minor daughters, and that in their opinion he was not given to lewd conduct with children. (*Id.*, at p. 1310, n. 15.) The court noted that the testimony was admissible, it would not consume much time, there would likely not be extensive cross examination since defendant had no prior criminal record, and the evidence went to main issue in case.

(e) Specific determinations of prejudice from erroneous exclusion of defense evidence under section 352

In *People v. Minifie, supra*, 13 Cal.4th 1055, 1071 the Superior Court found erroneous exclusion of evidence prejudicial under *Watson*. The excluded evidence concerning threats from third parties associated with the person defendant shot would have strengthened the self-defense considerably by showing that the Knight crowd had already killed a friend of defendant and threatened defendant would be next. The jury argument of the prosecutor "tips the scale in favor of finding prejudice," because prosecutor said Minifies alleged fear of being killed by the Knight crowd was contrived and unsupported by evidence.

In *People v. Wright, supra*, 39 Cal. 3d 576, Supreme Court held that exclusion of evidence that decedent was under the influence of heroin at time of death was harmless under *Watson* standard. Court faults offer of proof for not including any proposed testimony about the level of morphine found in decedent's urine or significance of that level. Claims inference between heroin influence and aggressive, irrational behavior was weak, and other witnesses contradicted defendant's claim that decedent threatened him.

In *People v. Cudjo, supra*, 6 Cal.4th 585, court finds exclusion of evidence of another's confession to the charged murder is harmless under *Watson*. Court so holds despite admitting that person allegedly confessing was other prime suspect in murder, disclosed actual crime scene details, and was closer in appearance to description from sole eyewitness. Court relies on fact that semen sample from victim included defendant but excluded his brother as possible donor, and that defendant's story that he had traded drugs for sex with victim was contrary to all other testimony about victim's lifestyle and values. Also used trial judge's negative credibility determination and "obvious indicia of unreliability" of inmate witness to determine a more favorable outcome for defendant was not reasonably probable.

In *People v. Franklin* (1994) 25 Cal.App.4th 328, Sixth District determines that exclusion of evidence from defendant that alleged child molest victim had said that her mother had licked her vagina was error. Court holds error harmless under miscarriage of justice standard, despite admitting that case was one on one credibility contest. Court says that evidence of prior false accusation was relevant to impeach credibility, but was cumulative of other evidence introduced for that purpose, i.e., evidence that victim once dreamed that her mother and defendant were kissing, had altered her testimony to make it less painful for her mother, and may have had access to the Playboy channel.

But see *Franklin v. Henry* (9th Cir. 1997) 122 F.3d

1270, finding federal constitutional error in exclusion of evidence, and declaring "grave doubt as to the effect of the error." Habeas relief granted under *O'Neal v. McAninch* (1995) 513 U.S. 432. Ninth Circuit characterizes prosecutor's case as not strong, noting its reliance on Child Sexual Abuse Accommodation Syndrome, the disputed nature of the medical evidence, and noting that the excluded evidence could have persuaded the jury that the alleged victim fantasized about sex.

3. Issues Regarding the Trial Record

(a) Offer of proof

(1) Statutory basis and purposes of requirements:

Evidence Code section 354 states: "A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous exclusion of evidence unless the court which passes upon the effect of the error or errors is of the opinion that the error or errors complained of resulted in a miscarriage of justice and it appears on record that:

(a) The substance, purpose, and relevance of the excluded evidence was made known to the court by the questions asked, an offer of proof, or by any other means;

(b) The rulings of the court made compliance with subdivision (a) futile; or

(c) The evidence was sought by questions asked during cross-examination or recross-examination."

(See Jefferson, California Evidence Benchbook (3d ed 1997) Vol. I, § 20.7; Witkin, California Evidence (3d ed 1986) Vol. 3, §2041.)

Purposes of rule defined in *People v. Whitt* (1990) 51

Cal.3d 620, 648: "The problem is illustrated by Evidence Code section 354, which has long prohibited state appellate courts from reversing a judgment based on the `erroneous exclusion of evidence' unless there is a `miscarriage of justice,' *and* the `*substance,* purpose, *and* relevance of the excluded evidence was *made known* to the [trial] court by the questions asked, an offer of proof, or by any other means.' (Italics added.) The statute serves two important purposes where, as here, an appellant complains that questions he asked of his own witness at trial were wrongly disallowed on relevance grounds. First, the `offer-of-proof' requirement gives the trial court an opportunity to change its ruling in the event the question is so vague or preliminary that the relevance is not clear. [Citations.] Second, even where the *question* is relevant on its face, the *appellate court* must know the `substance' or content of the *answer* in order to assess prejudice. [Citation.] This requirement is met only where the wording or context of the question makes the expected answer clear, or where the proponent of the evidence makes an offer of proof."

(2) When offer of proof is not required.

(a) When question discloses admissibility.

In *People v. McGee* (1947) 31 Cal.2d 229, 242, the defense called a medical expert and posed a hypothetical question regarding the treating physician's gross negligence of a shooting victim as the cause of death. Holding: "Defendant made no formal offer of proof, but such offer was not necessary because the questions themselves, together with colloquies with the trial judge, in the light of previously introduced testimony, clearly disclose their purpose, and since they were directed to defendant's own witness, they indicate that the answers were expected to be favorable to the defendant."

In *People v. Whitt, supra*, court determined that questions "Do you want to live?" and "Where do you desire to live?" were not "facially irrelevant" because "the range of constitutionally pertinent mitigation [in

a capital case] is so broad." (51 Cal.3d at p. 647.)

(b) When judge's rulings make offer futile.

In *Beneficial etc. Ins. Co., v. Kurt Hitke & Co.* (1956) 46 Cal.2d 517, 522, the court held: "Where an entire class of evidence has been declared inadmissible or the trial court has clearly intimated it will receive no evidence of a particular class or upon a particular issue, an offer of proof is not a prerequisite to raising the question on appeal, and an offer, if made, may be broad and general."

Montez v. Superior Court (1970) 10 Cal.App.3d 343, 351, notes statutory language that substance, purpose and relevance can be shown "by any other means." *Montez* holds that trial court refusal to allow defendant to call any of the 70 judges who selected grand jury members, unless a prima facie case of discrimination was first proved, obviated need for offer of proof regarding their testimony.

(c) Evidence sought by questions asked during cross or recross:

Reason for exception: requiring cross examiner to disclose object of questioning would forewarn witness and hamper the cross examiner.
(Witkin, *op. cit. supra,* §2045, citing *People v. Jones* (1911) 160 Cal. 358, 363.)

The recent case *Nienhouse v. Superior Court* (1996) 42 Cal.App.4th 83, 93, states that this exception is "simply a reaffirmation of the constitutional right of cross-examination." *Nienhouse* then notes that information sought on cross-examination from police officer concerned defendant's statements, a topic not covered on direct, and thus not a proper subject area for cross-examination. Consequently, offer of proof was required.

(3) Specificity of offer as to substance of evidence.

Offer must "indicate with precision the evidence to be presented and the witnesses who are to give it." (Witkin, *op. cit. supra*, §2042.)

In *In re Mark C.* (1992) 7 Cal.App.4th 433, the defense offered expert testimony regarding father's lack of propensity to molest in a dependency action alleging he had molested his daughter. In trial court, father's attorney asserts that basis of expert opinion is results of arousal test involving a penile plethysmograph and 33 other standardized tests. On appeal, father concedes that penile plethysmograph not yet accepted by scientific community, but counters that the expert opinion was also based on 33 other tests. Court of Appeal finds noncompliance with Evidence Code section 354 because, "Neither the trial court nor this court has been given any meaningful information about the nature, content or import of these various standardized tests . . . . Because of the uncertainty in the record concerning the nature of the proffered evidence, we cannot say the juvenile court erred in excluding it." (*Id.*, at p. 445.)

In *People v. Sperl* (1976) 54 Cal.App.3d 640, defendant made an offer of proof in an attempt to have court give him an evidentiary hearing on issue of discriminatory prosecution. Defense counsel gave names of witnesses he wanted to call, but did not specify what their testimony would be. Held, "defendant's offer of proof . . . was totally inadequate . . . . We have no way of knowing what the evidence at the requested hearing would have shown . . ." (*Id.*, at p. 657.)

(a) Showing of purpose and relevance.

(1) General principles of relevance: See Evidence Code section 210; Jefferson, op. cit., supra, §§ 21.1 to 21.30.) Evidence must have tendency in reason to prove or disprove any disputed fact that is of consequence to determination of the action. Section 210 specifies that relevant evidence includes evidence relevant to

credibility of witness or hearsay declarant.

(2) Deficient showings: In *People v. Schmies* (1996) 44 Cal.App.4th 38, defendant was charged with homicide in the death of citizen killed when struck by a police car pursuing defendant in a high speed chase. At trial, defense made offer to present expert testimony to prove unreasonableness of actions of pursuing police officer. Court of Appeal held that reasonableness of conduct of pursuing officers not in issue in prosecution for gross vehicular manslaughter, and that only disputed issue to which proffered evidence had potential relevance was whether officers' conduct was reasonably foreseeable response to defendant's conduct. As to that issue, the items of evidence which had been properly specified had no relevance.

In *People v. Fauber* (1992) 2 Cal.4th 792, 854, defense offered statements of missing husband allegedly killed by defendant to effect that he was in a bitter custody dispute with wife and that she had a contract out on him. Statements offered to impeach credibility of wife, but hearsay and relevance objections sustained. Supreme Court concedes evidence was relevant to prove that husband voluntarily vanished and was not murdered, and was nonhearsay evidence when so used, but since this ground not specifically raised below, defendant did not preserve issue for review.

In *People v. Pride* (1992) 3 Cal.4th 195, 234-235, defense offered tapes of six and a half hours of police interrogation, after prosecution introduced testimony of detective on a few discreet points. Relevance and purpose asserted in trial court was to prove defendant's "state of mind" at time of statements. On appeal, Supreme Court concedes that where one party has introduced part of a statement, opposing party

may introduce any other part to place excerpts in context. However, "defendant made no offer of proof as to how the tapes of his police interviews might correct any misimpressions allegedly created by the testimony and transcripts actually before the jury."